STATE OF MICHIGAN

COURT OF APPEALS

JAMES LEWIS,

Petitioner-Appellee,

v

BRIDGMAN PUBLIC SCHOOLS,

Respondent-Appellant.

FOR PUBLICATION
July 1, 2008

No. 261349
State Tenure Commission
LC No. 04-000008

ON REMAND

Advance Sheets Version

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

TALBOT, J. (*concurring*).

This matter is on remand by order of the Michigan Supreme Court based on court's determination that "the teach tenure act, MCL 38.101 *et seq.*, does not require the State Tenure Commission to apply a 'clear error,' rather than a 'de novo,' standard of review to its consideration of the preliminary decisions of administrative law judges." *Lewis v Bridgman Pub Schools*, 480 Mich 1000 (2007). The Court remanded the case "for consideration of whether the commission's decision was arbitrary, capricious, or an abuse of discretion; or unsupported by competent, material and substantial evidence on the whole record." *Id.*

Because I am constrained by the language of the Supreme Court's remand order, I am forced to concur with this Court's revised ruling. However, I must take issue with the abbreviated review engaged in by our Supreme Court, which focused solely on the standard of review and failed to address the substantive issue pertaining to the effect of statutory changes on the role and authority of the tenure commission. As a result, I am compelled to write separately on this important and dispositive issue. Specifically, I am concerned about the failure to review or consider the effect of the amendment of the teacher tenure act by 1993 PA 60, which initiated the use of a hearing officer, and the presumed propriety of the continued application of a de novo standard of review.

In order to understand my concerns, which were outlined in the original opinion in this case, which is[1] now on remand, I believe it is necessary to provide a short historical perspective of how the authority of the tenure commission has evolved and the Court's role in that development. Disputes regarding the authority of the State Tenure Commission to alter disciplinary decisions by school boards are longstanding and have arisen repeatedly in caselaw. See *Rehberg v Melvindale, Ecorse Twp School Dist No II Bd of Ed*, 345 Mich 731; 77 NW2d 131 (1956) (*Rehberg II*); *Rehberg v Melvindale, Bd of Ed*, 330 Mich 541; 48 NW2d 142 (1951) (*Rehberg I*). This line of caselaw recognized that

> [t]he tenure act places an additional safeguard upon the arbitrary or unreasonable dismissal of teachers and is designed for their protection. It does not, however, otherwise diminish or interfere with the administrative power of the local controlling board, nor require it to indulge in idle ceremonies. [*Rehberg I* at 548.]

However, these cases did not resolve the primary issue that is currently before this Court regarding the authority of the tenure commission to overrule a controlling board and substitute its judgment regarding the punishment to be imposed for teacher misconduct. That determination arose later in *Long v Bd of Ed, Dist No 1, Fractional Royal Oak Twp and City of Royal Oak*, 350 Mich 324; 86 NW2d 275 (1957), when our Supreme Court ruled that the teacher tenure act, "[d]iscloses clear legislative intent that the commission—following appeal by a teacher under said article 6—be vested with duty and authority to determine, anew and as original questions, all issues of fact and law theretofore decided by the controlling board." *Id.* at 327. It should be noted, however, that the Court made this ruling regarding "the commission's administrative function" based "particularly from language appearing in section 1 of said article 6, by which the commission is directed to conduct its hearing on the appeal 'the same as provided in article 4, section 4 of this act.'" *Id.*

At the time of this 1957 ruling, MCL 38.121, comprising article 6, § 1, provided:

> A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission. The state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal. Notice and conduct of such hearing shall be the same as provided in article 4, section 4 of this act, and in such other rules and regulations as the tenure commission may adopt.

MCL 38.104, constituting article 4, § 4, detailed the procedure to be followed by the controlling board and the tenure commission in the conduct of hearings, including, in relevant part:

> a. The hearing shall be public or private at the option of the teacher affected.

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[1] *Lewis v Bridgman Pub Schools*, 275 Mich App 435; 737 NW2d 824 (2007), rev'd 480 Mich 1000 (2007).

b. No action shall be taken resulting in the demotion or dismissal of a teacher except by a majority vote of the members of the controlling board.

c. Both the teacher and the person filing charges may be represented by counsel.

d. Testimony at hearings shall be on oath or affirmation.

e. The controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within 10 days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct.

f. Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within 5 days after the decision is rendered.

g. The controlling board shall have the power to subpoena witnesses and documentary evidence, and shall do so on its own motion or at the request of the teacher whom charges have been made . . . . [1937 (Ex Sess) PA 4, art IV, § 4.]

Under the statutory language, existing at that time, it was clearly appropriate to require the use of a de novo standard of review, given the authority of the tenure commission to not only review the record developed by the controlling board on appeal, but to also generate additional evidence and testimony as part of its review process.

However, 1993 PA 60 substantively changed the procedure to be used in the appeal of a decision by a controlling board and, in my opinion, necessitates a renewed look at the effect of the statutory changes on the process of reviewing controlling-board rulings in light of the current restrictions placed on the authority of the tenure commission. Even before amendment of the act, our Supreme Court acknowledged that many of its rulings pertaining to the authority of the tenure commission came, not from the language of the statute itself, but rather were the result of judicial construction. Specifically, the Court noted:

> [T]he act has been construed, as a matter of practice, to safeguard a tenured teacher against suspension except for reasonable and just cause and to provide for review of a suspension by the Tenure Commission. The act thus has been construed, although it does not literally provide therefor, to mean, in effect, that the commission shall determine whether there was reasonable and just cause for the imposition of the "discipline" imposed by the school board, whether the discipline imposed was suspension or discharge. [*Lakeshore Bd of Ed v Grindstaff (After Second Remand)*, 436 Mich 339, 356; 461 NW2d 651 (1990).]

What is currently problematic is the fact that the scope and authority of review by the tenure commission has been substantively circumscribed through amendment of the act but the courts continue to adhere to the judicially created prior review standard without any consideration of

these changes.[2] While I admit, as noted by the Supreme Court in its order of remand, that the act "does not require the State Tenure Commission to apply a "'clear error'" standard of review, I would contend that the statutory language also does not specifically mandate the use of a de novo standard of review. The Court has previously determined the appropriate standard of review by judicial construction. It would seem that amendment of the statute provides the perfect opportunity, as well as the necessity, to revisit our interpretation of this language and how it affects procedure.

As a starting point in this analysis, I must take issue with our Supreme Court's purported reliance on MCL 38.101 in its ruling in *Lakeshore*, which suggested that this statute provided the tenure commission with the authority to determine what constitutes an appropriate penalty for teacher misconduct and permitted it to reduce or alter a school board's determination regarding the appropriate level of discipline to be imposed for teacher misconduct. In reality, the relevant portion of MCL 38.101 states only that "[d]ischarge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause and only as provided in this act." Further, the suggestion that this purported authority derives from MCL 38.101 is directly contrary to the specific acknowledgement by our Supreme Court that the exercise of the decision-making function pertaining to penalties imposed for teacher misconduct actually originated through judicial construction. See *Lakeshore, supra* at 356.

The primary provision of the act addressing the role of the tenure commission has been amended to circumscribe its authority. MCL 38.104 now provides, in relevant part:

> (5) The hearing and tenure commission review shall be conducted in accordance with the following:
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> * * *
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> (m) *If* exceptions are filed, the tenure commission, after review of the record and the exceptions, may adopt, modify, or reverse the preliminary decision and order. The tenure commission *shall not hear* any additional evidence and *its review shall be limited* to consideration of the issues raised in the exceptions

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[2] This calls to mind an essay by United States Supreme Court Justice Antonin Scalia, in which he postulates:

> What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consist of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges! [Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997).]

> based solely on the evidence contained in the record from the hearing. [Emphasis added.]

Such language does not automatically, nor inevitably, lead to an interpretation requiring the use of a de novo standard of review or the vesting of authority by the Legislature in the tenure commission to substitute its judgment for the controlling board regarding the discipline to be imposed for teacher misconduct. Rather, I would contend that the language equally lends itself to a reading and understanding that the tenure commission may review the record and is restricted solely to a determination whether the controlling board's actions are substantiated by reasonable and just cause in accordance with the legislative intention underlying the act.

The amendment of the statutory language renders the reasoning provided by Chief Justice Riley in the dissent to *Lakeshore* all the more compelling and applicable to the circumstances of this case. Chief Justice Riley opined that "the function of the commission in reviewing the discharge or discipline of a teacher is limited to determining whether the local board's action was for 'reasonable and just cause.'" *Lakeshore, supra* at 358 (Riley, C.J., dissenting). Reviewing the history of decision-making by the tenure commission, Chief Justice Riley noted:

> There is, obviously, no express authority granted to the commission in the statute itself to reduce or otherwise modify a penalty imposed by a local board. The statute gives the local board the right to discharge or demote a teacher for "reasonable and just cause." The teacher has the right to appeal the board's action to the commission, which conducts its own hearing on the matter, in the same manner as the local board. On appeal, the commission acts as a "board of review" and is vested with "such powers as are necessary to carry out and enforce the provisions" of the act.
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> The plaintiff and the commission contend that this statutory scheme impliedly vests the commission with the authority to modify the decisions of a local board regarding the severity of the penalty imposed on a teacher. They rely on various decisions of this Court to establish that authority. In my view, such reliance is misplaced. [*Id.* at 359-360 (citations omitted).]

Relying on the language of the statute indicating that the tenure commission functions as a "review board," Chief Justice Riley opined, "[T]he mere fact that the commission has the authority to *review* the penalty imposed, to determine whether it is for reasonable and just cause, does not necessarily mean that it has the right to *alter* that penalty if it concludes otherwise." *Id.* at 365-366 (emphasis in original).

While acknowledging the authority of the tenure commission "to make an independent determination regarding whether the penalty imposed meets the reasonable and just cause standard," Chief Justice Riley opined that such authority was not bestowed by the Legislature with the intention to create a "super-school board." *Id.* at 366, 368. In conclusion, Chief Justice Riley took issue with the commission's authority to modify or substitute its judgment for that of the school board with regard to "how to best discipline the teacher," determining that "[t]here is no provision in the Act which expressly or impliedly grants this power to the [commission]." *Id.* at 369. As suggested within Chief Justice Riley's dissent, the resultant effect of such judicial

construction, without commensurate statutory justification, has served to elevate the commission's status from a "review board" to a policy-making body usurping the authority of local school boards.

As a result, given the substantive changes in the controlling statutory language, I believe it is improper to presume and continue the applicability of prior caselaw interpreting the authority and scope of the tenure commission's review. While I am constrained by the wording of our Supreme Court's order remanding this matter, I am compelled to voice my concerns regarding the restrictions imposed on our review and the resultant elevation of form over substance, precluding our ability to engage in a more thorough and considered analysis of the underlying issue.

/s/ Michael J. Talbot